UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CHARLES STROUCHLER, ET AL,

Plaintiffs,

v. 12 CV 3216 (SAS)

NIRAV SHAH, M.D., ET AL,

Defendants.

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New York, N.Y.
May 18, 2012
4:57 p.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

APPEARANCES

NEW YORK LEGAL ASSISTANCE GROUP
Attorneys for Plaintiffs
BY: BENJAMIN W. TAYLOR
-AND-
JASA/LEGAL SERVICES FOR THE ELDERLY IN QUEENS
BY: DONNA B. DOUGHERTY
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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
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BY: ANDREW H. MEIER

NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL
Attorneys for Defendant Doar
BY: DAVID A. ROSINUS,JR.

(In open court)

THE COURT: Ms. Dougherty.

MS. DOUGHERTY: Yes.

THE COURT: Good afternoon.

MS. DOUGHERTY: Good afternoon, your Honor.

MR. TAYLOR: Ben Taylor.

THE COURT: Mr. Taylor, all right. Good afternoon.

Ms. Golick.

MS. GOLICK: Yes. Good afternoon.

THE COURT: Mr. Meier.

MR. MEIER: Your Honor.

THE COURT: Good afternoon.

Mr. Rosinus.

MR. ROSINUS: Good afternoon, your Honor.

THE COURT: Ms. Yee.

MS. YEE: Good afternoon.

THE COURT: Good afternoon.

As you know, I have an application from the plaintiffs for a temporary restraining order and eventually a preliminary injunction. I have not yet received any papers in opposition from the defendants, right? It's plural, state/city?

MR. MEIER: That's right.

THE COURT: Right. From the defendants I have not yet received any papers. So I have only one side that I've heard from.

Obviously, with respect to a preliminary injunction, there's usually some amount of discovery and a hearing and all of that.

The real issue for today is a temporary restraining order. And while I definitely want to hear from the plaintiffs, I'd rather start with the defendants because at least the plaintiffs have had a chance to put in an extensive brief and a declaration.

So I will hear from you more, but I might as well start with the defendants who've had a few days now, because of my schedule, to at least absorb what you've written. So your thoughts with respect to a temporary restraining order. Of course you oppose one, but, go ahead.

MR. MEIER: Well, thank you, your Honor. And I have to begin by apologizing to the Court and to everyone, because I am here in the stead of my colleague, Robert Kraft, who is lead counsel on this case.

Mr. Kraft is particularly knowledgeable and experienced in these subject matters, and I am here not to delay these matters, but, rather, in the spirit of filling in for him so that we can move this proceeding along and move on to the next thing.

With that being said, with an eye towards scheduling, I will be asking that Mr. Kraft, who will not be returning to the office until Tuesday of next week, be given appropriate amount of time to prepare opposition papers on the preliminary injunction.

THE COURT: I'm not worried about preliminary injunction. I'm putting that aside right now. Of course he'll have the opportunity to prepare papers. There also may need to be discovery; there also may need to be a hearing.

I'm worried today about a TRO. And I'm, of course, going to ask the plaintiffs to justify why we need a TRO, and what relief they want in that TRO, etc.

So I thought you might want to start out addressing. That. I need to hear from you on the TRO.

MR. MEIER: I am prepared to speak on that.

THE COURT: Good. Because that's been definitely pending several days.

MR. MEIER: Didn't mean to indicate otherwise.

THE COURT: The PI we can talk about at the end of the conference. Let's focus on the TRO.

MR. MEIER: And, again, I'm here from the State Attorney General's Office, and I represent the Department of Health and the Office of Temporary Disability Assistance.

And I think what's notable about the complaint, about all the papers that I reviewed, including the declarations that plaintiffs have submitted and the memorandum of law is that I don't see where the state defendants are alleged to have violated federal law. To the contrary.

THE COURT: One second.

MR. MEIER: What is alleged --

THE COURT: Wait, wait. Give me a minute. I have a problem. Here it is. I'm sorry.

You don't see how the plaintiffs have alleged that the state law has been violated?

MR. MEIER: That federal law has been violated by the state defendants.

THE COURT: Thank you. Federal law by the state defendant.

MR. MEIER: That's right, your Honor.

My understanding of the allegation, based on what's claimed in the complaint, is that they allege that the city agency has been relying on a, quote, unreasonable interpretation of state regulations that the plaintiffs concede are in compliance with your Honor's decision in *Mayer v. Wing*.

And their allegation is that virtually every time someone says their benefits have been wrongly reduced, contrary to *Mayer v. Wing* embodied by this regulation, they go to an OTDA fair hearing and they prevail.

This case is basically then not an allegation that the state has done anything wrong; they are sort of a Trojan horse here involving what they call the change to the regulation. And I'd just like to briefly explain that the change in the regulation is not a -- it's not in any way an alteration of the regulation that would be contrary to your Honor's ruling in *Mayer v. Wing*.

THE COURT: Well, it's a change. What's the change?

MR. MEIER: I can explain that.

The change is that previously someone who required 24-hour care fit the definition of continuous personal services. And so their authorizations and reauthorizations to receive the care that they are getting had to be approved by the local medical director.

Under the change, someone who --

THE COURT: Is this October 4, 2011?

MR. MEIER: Yes.

THE COURT: Okay.

MR. MEIER: Thank you.

The City Council -- I believe that is correct, your Honor.

The change is now someone who receives more than 16 hours a day, as opposed to 24-hour around-the-clock, also meets the definition of continuous care; and, thus, their authorizations and reauthorizations also have to be looked at by the local medical director.

So this change means that local medical directors, and I believe --

THE COURT: Did you say you were directors, local medical directors?

MR. MEIER: Yes.

THE COURT: Oh, you are. Okay. I just want to make sure I heard the third word right.

MR. MEIER: I think they are also called local professional directors.

THE COURT: Okay.

MR. MEIER: This is why, again, I am apologizing for filling in for Mr. Kraft, your Honor, I'm sorry.

MR. ROSINUS: Your Honor, the local medical directors are --

THE COURT: Now I can't hear your word. Local medical directors.

MR. ROSINUS: Directors are, as I understand structure, beneath the local professional directors. They sort of lead the unit. And the LPDs lead the unit; the LMDs are beneath them.

THE COURT: Okay. Go ahead.

MR. MEIER: So my understanding of what's happened is pursuant to the change in the regulation -- and this is consistent with the allegations -- this is, in fact, the allegation that is being made in this case -- is after the change in regulations, the local medical directors are looking at more cases both in terms of authorizations and reauthorizations. And they report that anecdotally, the plaintiffs do, that they are seeing a number of reauthorizations being denied for continuous care services based on that.

These three plaintiffs that they've identified are all people who would be unaffected by the change, because they I think -- and anyone correct me if I'm wrong -- they were already receiving 24-hour care before; it had nothing to do with the 16-hour. The review of their cases would have been the same under the statute prior to or after the regulatory change.

And here, assuming that the allegations in the complaint are true, when these three plaintiffs have their hearings -- I believe one has already had a fair hearing and prevailed -- their allegation is that OTDA and the Department of Health continue to follow *Mayer v. Wing*, and virtually all people who say that they have wrongly lost benefits prevail at fair hearings.

THE COURT: But do they continue to get benefits during the interim?

MR. MEIER: They do.

THE COURT: The same level?

MR. MEIER: They do, as long as they apply for a hearing within a certain amount of time or otherwise approved, I believe. And I think that all these three plaintiffs are continuing to receive the same services.

THE COURT: So no decrease in benefits.

MR. MEIER: That's right, your Honor. One has already received their fair hearing and prevailed.

THE COURT: I understand that. But no decrease in the interim.

MR. MEIER: That's right.

And the other two have fair hearings pending, and have what's called care continuing or the same level of benefits is provided throughout.

So thus, our argument is twofold: A, we have not been accused of any wrongdoing, so it's a who am I/why am I hear argument. And, B, these three plaintiffs have not established that they will be irreparably harmed but for the issuance of a TRO and, thus, we object to the TRO.

MR. ROSINUS: May I speak briefly on behalf of the city, your Honor?

THE COURT: On behalf of the city.

MR. ROSINUS: Yes.

THE COURT: Yes.

MR. ROSINUS: I'm for Commissioner Doar, your Honor.

I just wanted to agree with the state defendant also. And none of these defendants has been irreparably harmed.

THE COURT: None of these plaintiffs.

MR. ROSINUS: None of these plaintiffs. And there are only three plaintiffs before the Court. There's no class certification yet, of course, your Honor.

THE COURT: Of course.

MR. ROSINUS: And there's no motion yet; although the plaintiffs have written --

THE COURT: I know. It's a putative class. But right now we have Mr. Strouchler, Ms. Campos, and Ms. Rokaw.

MR. ROSINUS: That's right, your Honor.

THE COURT: Okay.

MR. ROSINUS: And so with respect to the TRO that plaintiffs are seeking, it's, in our view, vastly overbroad, in light of the fact that there are only three named plaintiffs in this case right now.

The plaintiffs are requesting that the city be enjoined from reducing or terminating split-shift home care services to all medicaid recipients currently receiving these services. I don't see how they can ask for this when there's no class, when indeed the only plaintiffs --

THE COURT: Then you're saying there could never be a TRO or a preliminary injunction prior to class certification in any kind of class. There's always going to be class representatives, three, four, two, or five, or something, in a putative class; and sometimes those cases start with the request for a preliminary injunction or a temporary restraining order. They never certify that fast. So it's always representative plaintiffs. But they do have to be injured.

Now, if your real argument -- probably what Mr. Meier said -- is that if these three haven't suffered any harm and aren't likely to do so because their benefits are not reduced during the period between the notification of reduction and the fair hearing, why would we have to have a TRO at all? Why not just get to the preliminary injunction and have the hearing and decide what to do.

MR. ROSINUS: Well, yes, your Honor, that's our secondary argument, I suppose, and maybe our primary argument now that these three individuals have not had their benefits reduced and --

THE COURT: In any way. No cutback at all.

MR. ROSINUS: That's my understanding. Certainly right now, your Honor, they do not have any cutback; they still receive so-called split-shift care, which is --

THE COURT: Right. I remember split-shift.

MR. ROSINUS: Two 12-hour shifts. So yes, your Honor.

THE COURT: Well, it's a start.

Ms. Dougherty.

MS. DOUGHERTY: Yes, your Honor. You're going to lead.

THE COURT: I know Ms. Salzman wanted to be here.

MS. DOUGHERTY: Yes. Ms. Salzman --

THE COURT: We couldn't help it. I was on the bench till 8 o'clock last night. It was awful.

So let's first answer -- first we'll ask you to answer the state's argument that they are not even sure why they are here at all, that their change in regulation in October of 2011 doesn't do anything that harms your class. But when you get past that argument, how about the fact that there's no need for a TRO, because nobody's benefits are being reduced yet.

In other words, they have the opportunity for a fair hearing; they go to the hearing. I suppose if they lost at the hearing and the cut actually occurred, you'd have a different argument. But we might be able to get to the PI soon enough, I don't know. Those are the two things I'd like you to address.

MS. DOUGHERTY: Yes. Okay.

The first, your Honor, on the regulation that changed in October, we do agree with the state that according to the state, the change should not have had any substantial effect. There were several changes, one that went -- it did include 16 hours; the other was that there was a change in some language from unscheduled needs, does someone have unscheduled needs, to can needs be predicted; predictable needs.

This change, for whatever reason, has resulted in an across-the-board, we believe, change by the city to the cut.

THE COURT: Right. But I was sticking with the state.

MS. DOUGHERTY: Yes. One of the reasons that the city is using, is many of these clients, including these three clients, need turning and positioning. They are bed-bound and need turning and positioning.

That is not in the regulation.

The city, since October, has determined that because it's not in that new regulation --

THE COURT: Was it in the old one?

MS. DOUGHERTY: It was not.

But the city has now taken the position that since it is a new regulation, that they do not have to provide nighttime turning and positioning.

THE COURT: I understand.

MS. DOUGHERTY: That's what we are seeking, the state, your Honor, has -- yes, if you get to a fair hearing, they will -- most of these clients are winning. We reviewed -- which, by means by the city, is doing something wrong.

THE COURT: I'm trying to stick with the state, and you keep sliding to the city, not surprisingly.

Why are you suing the state?

MS. DOUGHERTY: We're not asking for a TRO against the state.

THE COURT: Oh. Okay. Good.

So you just won; there's not going to be a TRO issued against the state.

But why is the state a defendant at all?

MS. DOUGHERTY: Because of this regulation. This regulation, if it is that there's no turning and positioning any longer --

THE COURT: You keep saying "any longer." I asked you whether the earlier regulation had language about that; you said no.

MS. DOUGHERTY: No.

THE COURT: So there's no change.

MS. DOUGHERTY: But, your Honor, the earlier regulation in practice and policy --

THE COURT: That's different. Practice and policy is the city.

MS. DOUGHERTY: But practice and policy with the state also, your Honor. We have a fair hearing that was recently determined that we -- it's not in our papers, we just got it two days ago, where the ALJ upheld a cut in services based on a mistake being made. And the mistake being made was not complying with this regulation.

THE COURT: In what way didn't it comply with the regulation?

MS. DOUGHERTY: It didn't comply because the regulation -- the fair hearing -- the city said that toileting could be predicted, and nothing was any longer -- there's also a definition with sum in total.

They have said that the previous was a mistake; that turning and positioning, that toileting, if you can even wiggle, and that's all you can do, that that isn't total assistance with toileting, and that toileting can be predicted.

The state has now upheld this very irrational decision, where before, your Honor, the old regulation didn't have turning and positioning, but it was always assessed for -- and both the city and the state, even though the reg. was there, in practice, always allowed for turning and positioning.

If that has now changed and the state is now upholding the turning and positioning is no longer a task, because it's not in the reg., and we can only tell from this one fair hearing decision --

THE COURT: Right.

MS. DOUGHERTY: -- and if they are allowing, they are not directing the city that they are wrong, they are not giving some direction saying, Look, you've got this wrong, this isn't what our policy is, both of those things and not directing their local district and in sometimes upholding it where now this person that we only have this fair hearing decision --

THE COURT: What's the title or violation of law that the state has committed?

MS. DOUGHERTY: The violation is the Medicaid Act under the Comparability Act, the ADA. Amount, duration, and scope, they are not providing the same amount, duration, and scope in services. It is also under amount, duration, and scope to reasonably achieve the purpose. All of those things violate --

THE COURT: Okay.

MS. DOUGHERTY: -- federal law.

THE COURT: All right. I suppose that's enough for tonight. We weren't here on a motion to dismiss.

MS. DOUGHERTY: No.

THE COURT: But I was curious why the state is a defendant at all.

But the good news is they are not seeking a TRO --

MS. DOUGHERTY: We are not seeking a TRO from them, your Honor.

THE COURT: -- as to the state; so I guess for tonight, anyway, Mr. Meier, you have nothing to worry about.

As we've talked about the preliminary injunction hearing, by then you'll have responded. You may have responded with a motion to dismiss as opposed to an answer, I don't know. At least you have some explanation today on the record of the theory of holding the state in. So you'll decide how to answer that.

I think I just extended your time to answer till when?

MR. MEIER: Actually, that application was made by the city, your Honor. I was going to make my own application today.

THE COURT: What did the city get?

MR. ROSINUS: I got 30 days, your Honor.

THE COURT: Till what? What date?

MR. ROSINUS: It was June 21st. I think June 20th or

21st.

THE COURT: Did you want the same date?

MR. MEIER: The thing with that, your Honor, as I indicated, I'm filling in for Mr. Kraft --

THE COURT: I heard that.

MR. MEIER: -- who's not coming in till Tuesday. So the things on Mr. Kraft's plate when he comes back will be the preliminary injunction motion, their expedited discovery requests, and answering the complaint. And I don't see why there's a need to answer while the preliminary injunction is --

THE COURT: Well, because if he answers with a motion to dismiss, the sooner we know that, the better. Here we are planning expedited discovery and a preliminary injunction hearing and everything else. Is the state here or not here. So if it's going to be a motion to dismiss, the earlier the better.

I realize if he's going to just answer, it's not so urgent. Answers are very predictable; they usually say denied, denied, denied.

So I know what they are going to say. But a motion to dismiss is different. And you do have more information than you had walking in, I think, on the theory. So he'll review that.

All right. Anyway, let's get to the TRO.

So now let's talk about the city.

So I understand why the city is here. But they say none of the three representative plaintiffs have actually suffered any cut in service, not by an hour.

MS. DOUGHERTY: They have not. The three plaintiffs that we have brought all had aid to continue because they all got to attorneys, they all requested the hearing on time. But that doesn't mean they weren't harmed, your Honor.

They have suffered, you know, the threat of this harm in that they had previously -- Ms. Rokaw had previously won a fair hearing on split shift on the very issue that they turned around that her toileting needs were unscheduled.

THE COURT: All right. But I don't think that the threat hanging over her is really going to be sufficient to issue some kind of a broad temporary restraining order. The fact is there hasn't been an hour's loss of help.

MS. DOUGHERTY: Of these three.

THE COURT: I understand. They are your named plaintiffs.

MS. DOUGHERTY: But, your Honor, we believe that what has happened -- and that's what the declarations with the -- I don't know, it's about 20-odd individuals in those declarations, Ms. Terry, which is in the declaration of Mr. Jeffrey, she lost; she had actually asked for aid to continue timely. It was -- the state did not provide it; it was an administrative error. And for two weeks, Ms. Terry went without turning, positioning, or diaper change, and suffered harm.

In addition, we now have -- as I said, this fair hearing, where we know this person has probably lost care because this was upheld in December. In addition, your Honor, many people we know -- there's only about 1,000 of these individuals; so we don't think that this TRO between now and the time of a preliminary injunction hearing will not be of great difficulty for the city. And for some --

THE COURT: What are you seeking?

MS. DOUGHERTY: We are simply seeking that the -- for those people currently receiving 24-hour services, that they not be terminated or reduced between now and the time of the hearing.

THE COURT: That's it.

MS. DOUGHERTY: That is it. As well as, your Honor -- but this is -- I should -- that's the stay.

We are also asking for -- that the city provide between those individuals that were reduced or terminated from the time of the change in the break, October 4th, that we receive contact information from them and the notice, so that we may follow up with those individuals. We are seeking a class certification, and that they provide that information to us.

THE COURT: All right. But that's really a request for expedited discovery, not really a TRO, to me. There's a difference. That's a request for discovery.

All right. So back to the TRO.

The TRO is only between 1,000 and 1500 people who now receive 24-hour care.

MS. DOUGHERTY: Yes.

THE COURT: That's all it is?

MS. DOUGHERTY: That's all it is, your Honor.

THE COURT: For those 1,000 or 1500, the TRO ask that they not have a reduction in care or termination until the PI hearing.

MS. DOUGHERTY: Yes.

THE COURT: Now, Mr. Rosinus, that doesn't sound as broad as you made it sound. You said you were asking for terribly broad relief. Is that terribly broad that they shouldn't actually lose an hour of care until this Court can review the situation?

MR. ROSINUS: I think the concern, your Honor, is that if HRA can't reduce even people who, for instance, have improvements, material improvements in their condition, then that's too broad of an injunction. We should be able to continue at least to reduce services for people who don't have a medical need, which is to say if we can document that there has been --

THE COURT: Right. But you are defining it. That's the whole point, as to how you define it. If you suddenly decided that turning and positioning is not a medical need, and toileting is not a medical need, if it can be scheduled every two hours, then that's exactly what the lawsuit is about.

If somebody is getting this care because, I don't know what, they had an auto accident last week, and they're going to get better in six weeks, there wouldn't be really any objection to stopping it in the ordinary course; it would have been stopped before this change and after this change. They are not talking about that. That must be a minuscule percentage of these 1,000 to 1500.

Most of these people, I gather, don't get better, frankly. They are permanently, let's say, in the condition they are in. It must be a very small group who are temporarily, shall we say, on 24-hour care and get better. That's my guess.

MR. ROSINUS: Well, your Honor, that may be the case.

I think that two things --

THE COURT: And if that's the case, then maybe you can negotiate with Ms. Dougherty to come up with language that would be acceptable to the city so that there isn't an injunction that you can't live with. It may be that this can be negotiated; that it's for that small group where essentially their condition remains the same, but the only reason a change would be made is because of the new application of the amended regulation that they fear will lead to change, such as this turning and positioning question, scheduled toileting, etc.

If they want you to hold off on that till we can have a PI hearing, you're really better off negotiating language that works for both sides, because you could carve out the people who really get better as opposed to are redefined. You see what I'm saying, Ms. Dougherty? Redefined is different from actually getting better. It's got to be a very small subset, as I say, who get better.

MS. DOUGHERTY: Yes. We believe that they're -- although they've used that terminology, "get better," that that is not what is occurring.

THE COURT: True. But there must be a few.

MS. DOUGHERTY: Yes. If someone had an auto accident and then three months from now --

THE COURT: Exactly.

MS. DOUGHERTY: But again, your Honor, we think that this -- as is in the declarations, there are people six to 100, none of them were getting better.

THE COURT: No, I understand.

So that's why I'm saying, one suggestion is you take care of the overbreadth problem that Mr. Rosinus poses when he said that would stop us even from taking care of people who get better, taking them off the 24-hour care. That can be carved out with some lawyering. Okay.

MS. DOUGHERTY: Right. We're more than willing to work with them on language if they believe they can carve that out.

THE COURT: I believe you can carve it out.

So what else is overbroad about it, Mr. Rosinus?

MR. ROSINUS: Well, I think, your Honor, I mean that's the main overbreadth problem. I also think it's important to keep in mind that there are two problems that plaintiffs are posing with what the LMDs are doing.

One is this change in the regulation from saying that people whose needs can't be scheduled get split shift, to saying people whose needs can't be predicted.

Returning to what we were talking about earlier, in none of the three named plaintiffs' cases, as far as I can tell, do they allege that that regulation has been implemented in that way, in such a way that the previous language would have been -- would have made a difference in the LMDs' determination versus --

THE COURT: I understand that as to the three, but what Ms. Dougherty wants me to focus on are the 20 or so that are in the declarations. I really haven't had a chance to focus on that group, and maybe you haven't either. But she said if I really looked at those, there is that imminent risk.

MR. ROSINUS: Yes, your Honor.

THE COURT: And I always feel the status quo should be maintained probably voluntarily. Best to negotiate and never have a court impose it on you. It's a short amount of time. I want to get to the PI hearing as soon as I can. For those couple months I don't see that it's going to hurt the city very much; I don't think there's money at stake. I don't think they are really going to cut anybody back in that time.

Mr. Meier started out by saying nobody really gets cut back if they promptly ask for a fair hearing. They do it within a certain amount of time; they get the fair hearing. Likely they win; but if they don't, they can appeal, this and that.

It's not much of a burden either. It wouldn't burden the city very much to say we'll work this out; we will hold off on terminating anybody or reducing anybody till you, the Court, can hold a PI hearing and decide what to do.

MR. ROSINUS: We can certainly consider -- if your Honor would like us to talk with the plaintiffs about language, we can consider that.

THE COURT: I think that would be the best result of tonight's hearing. See if you can negotiate a limited TRO that protects this relatively limited group, between 1,000 and 1500 people, who are chronically in a condition, whatever it is. But they shouldn't be terminated or reduced in care while we're waiting for the PI hearing. Short period of time.

So maybe we should turn to see -- since I'm asking you to negotiate, maybe I should tell you how fast I can get to a PI hearing.

So what would it take? What kind of expedited discovery would you need, Ms. Dougherty, to be ready for a hearing?

MS. DOUGHERTY: We have already sent the defendants a list of what we were looking for in expedited discovery. We were looking for 30 -- we were looking for some very small documents, some depositions of the LMDs, and we were thinking that we could be in a preliminary injunction hearing in 30 -- around 30 days.

THE COURT: What about the defendants? Now I have to say defendants. How long would it take for you folks to be ready for a PI hearing? They would probably want to depose -- maybe depose or at least ask questions of or get records from some of these three plaintiffs or even the 20 in the declarations who are described -- have you produced any records to them yet about these people?

MS. DOUGHERTY: Your Honor, in what we've submitted to the Court, the records are attached as exhibits. So if there is additional documents -- they are within the city records. But if there are additional documents that we have, certainly we could turn them over.

One of the questions we have for the defendants is the -- it seemed to be in these hearings that LMD said there was a special project that they were working on to reduce these cases, and that's what we're interested in. They said that they were working weekends; that they had gotten an email to reduce all of these 24-hour cases. And that came up in hearings. And certainly that is some of what we want to take depositions about.

THE COURT: Let me return to my question.

How long would it take the defendants, do you think, to be ready for a preliminary injunction hearing in fairness? How much discovery would you need and how long do you think it would take?

MR. MEIER: I think that, your Honor, that, again, as -- I would say about a month to five weeks from this coming Tuesday for the hearing.

But, your Honor, of course, in terms of the discovery that they are demanding from us, I can't see how they could characterize it as small. They literally ask for every single document relating to regulatory change. I mean we're talking about a state organization that has changed the regulations. In terms of paper, it's a monstrous request. And to have that on an expedited schedule is needless.

THE COURT: Maybe they don't need that and can negotiate with you as to what they need to support the preliminary injunction request. They may not need right now every piece of paper relating to the change in regulation, regulatory language. Let them talk to you about that.

MR. MEIER: Then assuming that we will negotiate these demands, then I would say that five weeks -- did I say five weeks from this coming Tuesday -- would be a good return date for us.

MR. ROSINUS: Your Honor, from the city's point of view, even their first request, which is asking us to notify basically potential class members, people who have had their services reduced since October 4th, 2011, which is the date the regulation changed --

THE COURT: Who've had their services reduced or gotten the notice? Which was it?

MR. ROSINUS: Sorry. Yes.

THE COURT: Received a notice.

MR. ROSINUS: Received a notice of reduction or termination.

THE COURT: That's right.

MR. ROSINUS: The database that we have is not the most modern. We have to do a good deal of searching by hand. And that particular request could take us as many as 30 days. I know that plaintiffs would like to have time to review after that.

So I think I would just respectfully submit that that time frame be considered in how long it would take before having a PI hearing. That might mean maybe a little bit more than five weeks, maybe six or seven.

THE COURT: As long as you can negotiate the TRO, I'm not against it, particularly because I'm starting a six-week trial on Monday. So my time to have a real fair hearing may be two days' worth, I don't know what we'd need. You know, a PI hearing can be like a trial. So for me to set aside two or three days, I really have to wait till my six-week trial ends anyway.

MS. DOUGHERTY: Your Honor, one concern, of course, is those people between -- who did not get to lawyers and who have not had a fair hearing and won, so those people between October and now who have lost their hearing, if there was a way to identify those who have actually lost their care --

THE COURT: Well, he said he was going to try to do that, that's why he asked for more time.

MS. DOUGHERTY: Okay.

THE COURT: So it really turns on being able to negotiate kind of a standstill for that, I still say, short period six, seven weeks is a short period, so that nobody actually suffers --

MS. DOUGHERTY: Yes.

THE COURT: -- a loss of care during the interim weeks. I still think it's not asking a lot of the city. It's a small group. These are elderly people. I don't want to put anybody at risk. You really shouldn't want to either for a short period of time.

So let me look at the calendar and suggest a potential date, although I think I have another trial scheduled, but such is life.

So we've been talking July. How about the week of July 9th? That's the good week. I start a trial again on July 16th supposedly. So how about the week of July 9th for a hearing? You think it would be a two-day hearing? Would that be right?

MS. DOUGHERTY: Two or three.

THE COURT: There's no way to really know.

MS. DOUGHERTY: The last hearing we did that was similar to this took us, I think, three days, your Honor.

THE COURT: I'm just thinking. Sixteen years ago I'm sure I worked faster than -- I have slowed down significantly in 16 years. You, of course, haven't changed at all. But that is not true for me.

So, in any event, let's say Wednesday and Thursday of that week, the 11th and 12th of July.

MS. DOUGHERTY: Yes, your Honor.

THE COURT: All right.

Two-day PI hearing.

Now, I do need submissions. Obviously, the city and state want to respond to the papers they receive, putting aside the answer, motion to dismiss, whatever it's going to be, you'll want to respond to these papers, and I'll have want to have read them before the PI hearing. And the plaintiff may want to supplement its papers depending on the discovery it receives. So we need to think about a schedule for that.

If the hearing is July 11th, can the defendants get at least their initial response in by June 18, and any reply papers where you could add to what you've already done, Ms. Dougherty, by June 25th?

MS. DOUGHERTY: Yes, your Honor.

THE COURT: All right.

Let me make a note of what I'm doing here. That would start at 10 o'clock.

MS. DOUGHERTY: Ten o'clock, your Honor?

Your Honor, we also had this week sent our premotion letter on class certification. We wanted to know how to schedule -- we need to schedule that.

THE COURT: I don't think realistically we can get to that while we're doing this. Which is more important, a PI hearing? There's only so much I can do and you can do and the defendants can do.

MS. DOUGHERTY: Certainly the injunction hearing, your Honor.

THE COURT: Is more important. Is it?

MS. DOUGHERTY: Let me just ask my co-counsel, but, yes, I believe so.

Yes, your Honor, obviously.

THE COURT: Okay.

MS. GOLICK: Excuse me.

We're ready to move for class certification.

THE COURT: Without this discovery that you've asked for?

MS. GOLICK: We have at least 60 individuals who we've identified already, so the discovery --

THE COURT: Well, they may challenge numerosity. I mean 60 is just a little over 40, but you will learn about more as you get this discovery.

I don't think realistically I could handle it anyway, so why don't we put that off a little bit, because I'm going to schedule another conference anyway, in case your negotiations break down on either the expedited discovery or a TRO. So I think we can think about that. Why don't you propose a schedule.

MS. DOUGHERTY: Okay. Thank you, your Honor.

THE COURT: So let me schedule another conference. But first, one more thing to write.

Okay. Now, you're going to try to do some negotiating. Maybe I should -- I know what I'm thinking, but I have to look at this calendar.

I could see you Thursday, May 31st, at 5 o'clock. That gives you a week to do all this negotiating, okay? And if all else fails, you'll renew the application and I'll have to deal with it.

MS. DOUGHERTY: Yes. That's fine for plaintiffs, your Honor.

THE COURT: I've given guidance, I think, as to how it could be worked out, but in case it can't. So we'll have a conference May 31st at 5.

Now, we may meet anyway to talk about any other discovery issues or class cert. or whatever even if you work out the TRO language. I suppose if your negotiations break down totally, then I need some minimal responsive papers on the proposed TRO, if you can't work it out yourselves.

But you really have to have in, the city, that is, which isn't waiting for Mr. Kraft, by the close of business Tuesday. Oh, it gives you Monday and Tuesday to negotiate. All right. That's the best I can come up with. But I'm going to see you next Thursday. Best I can do.

I think you can work this out, I truly do. It's always better to do it voluntarily than be ordered by a court. Makes for bad press.

So I'll call that a status conference. Okay.

Yes, Mr. Meier.

MR. MEIER: Your Honor, could I just ask for 6/27 for our time to either answer or move to dismiss?

THE COURT: As opposed to -- or did I not set a date?

MR. MEIER: I don't think we got to it.

THE COURT: Oh, okay. That sounds reasonable.

MR. MEIER: Thank you very much.

THE COURT: June 27.

Okay. We're all set.

Is there anything else you folks need to say today?

MS. DOUGHERTY: No, your Honor.

THE COURT: Okay. This has been helpful.

Thank you.

MR. MEIER: Thank you, your Honor.

MR. ROSINUS: Thank you, your Honor.

THE COURT: The city's answer is whatever I said, 18th.

MR. ROSINUS: June 20th.

THE COURT: All right. The 20th. That's what I said.

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